85-1459

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES H. POWELL,

Appellant

v.

RUTH ANN POWELL,

Appellee

ON APPEAL FROM THE COURT OF APPEALS OF TEXAS FOR THE TENTH SUPREME JUDICIAL DISTRICT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Did Congress intend by its enactment of the Uniformed Former Spouses Protection Act, 10 U.S.C. § 1408, to retroactively remove the preemption established under prior federal law as interpreted in *McCarty v. McCarty*, 453 U.S. 210 (1981), thereby nullifying this Court's decision in *McCarty* and replacing the preemptive federal statutes with state community property statutes which redefine Appellant's property interests in military retirement pay established at the time of a 1965 divorce?

2. Is the application of Texas community property and partition laws to a 1965 divorce, whereby military retirement benefits became solely vested in Appellant under prior federal law and by a final judgment based on such law, repugnant to the Constitution and laws of the United States?

3. Does the application of current Texas law to property rights vested under prior federal law and by final judgment result in a divestiture of such rights and a deprivation of defenses related to such rights so as to constitute a denial of federal due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

4. Did the award of a money judgment and an award of forty-six percent of Appellant's military retirement benefits to Appellee constitute a taking without compensation or a denial of federal due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

List of Parties

The caption of the case in this Court contains the names of the parties.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Supreme Judicial District of Texas, contained in the Appendix (A-1) is an unpublished opinion. (The opinion was ordered published on January 9, 1986). The denial of review (A-12) and the refusal of rehearing (A-13) by the Texas Supreme Court were without opinion. The opinion of the Court of Appeals on the appeal of the prior case between the parties to this suit (A-20) is reported at 620 S.W.2d 253 (Tex.App. 1981, error ref. n.r.e.).

STATEMENT OF JURISDICTION

This Court's appellate jurisdiction is invoked under 28 U.S.C. § 1257(2). The lower courts have applied the Texas community property statutes, which create a presumption in favor of community property (Texas Family Code §§ 5.01 and 5.02 and their predecessor statutes), and Texas partition statutes (Texas Property Code, § 23.001) in a manner repugnant to the Constitution and laws of the United States. Despite Appellant's contentions to the contrary, the lower court has applied Texas community property law which would have been applicable to military retirement benefits prior to *McCarty v. McCarty*, 453 U.S. 210 (1981), as if such laws had never been preempted by federal law. The property rights claimed by Appellee arose under the federal law in effect at the time of the parties' divorce in 1965. The Court of Appeals Judgment (A-7) acknowledges that such rights arose from the divorce. Jurisdiction of this Court is supported by *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981); and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 66 L.Ed. 239, 42 S.Ct. 106 (1921).

The Court of Appeals further held in this case that by virtue of *Cameron v. Cameron*, 641 S.W.2d 210 (Tex 1982), § 3.63(b)(1) of the Texas Family Code, which became effective September 1, 1981, is applicable to this case, resulting in a retroactive application of such statute so as to redefine and deprive Appellant of vested property rights which he would have acquired under prior Texas law, assuming arguendo that Appellant's rights in his military retirement benefits were not subject to preemptive federal law. Such retroactive application of § 3.63(b) of the Texas Family Code is repugnant to and a violation of the takings and due process clauses of the Fifth and Fourteenth Amendments.

The Court of Appeal's judgment requested to be reviewed by this court was rendered on February 28, 1985 (A-1). Appellant's Motion for Rehearing was overruled by the Court of Appeals on March 28, 1985. (A-11). Review by way of Application for Writ of Error was made to the Texas Supreme Court and denied on July 10, 1985 (A-12). Appellant's Motion for Rehearing filed in the Texas Supreme Court was overruled on December 4, 1985 (A-13) and constituted a final judgment or decree rendered by the highest court of the state in which a decision could be had. This case is being docketed within ninety (90) days of the denial of Appellant's Motion for Rehearing by the Texas Supreme Court. Notice of Appeal has been filed in both the Texas Supreme Court and the Court of Appeals for the Tenth Supreme Judicial District, Waco, Texas, on January 17 and 16, 1986, respectively (A-17,19). In accordance with the Texas Rules of Appellate Practice the record has been returned to the Court of Appeals for the Tenth Supreme Judicial District of Texas, P.O. Box 1606, Waco, Texas, 76703.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS APPEAL

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or propery, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10 U.S.C. § 8911

The Secretary of the Air Force may, upon the officer's request, retire a regular or reserve commissioned officer of the Air Force who has at least 20 years of service computed under section 8926 of this title, at least 10 years of which have been active service as a commissioned officer. Aug. 10, 1956, c. 1041, 70A Stat. 549.

10 U.S.C. 8929

A member of the Air Force retired under this chapter is entitled to retired pay computed under chapter 871 of this title. Aug. 10, 1956, c. 1041, 70A Stat. 554.

10 U.S.C. § 1408

(a) In this section:

* * * *

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

* * * *

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

****

The full text of 10 U.S.C. § 1408 is in the Appendix (A-24).

Texas Family Code, § 3.63

In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

Texas Family Code, § 3.63
As Amended by Acts 1981, 67th Leg., p. 2656, ch. 712, § 1
eff. Sept. 1, 1981

(b) In a decree of divorce or annulment the court shall also order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage:

(1) property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition; or

Texas Family Code, § 5.01

(a) A spouse's separate property consists of:

(1) the property owned or claimed by the spouse before marriage;

(2) the property acquired by the spouse during marriage by gift, devise, or descent; and

(3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

(b) Community property consists of the property, other than separate property, acquired by either spouse during marriage.

Texas Family Code, § 5.02

Property possessed by either spouse during or on dissolution of marriage is presumed to be community property.

Texas Property Code, § 23.001

A joint owner or claimant of real property or an interest in real property or a joint owner of personal property may compel a partition of the interest or the property among the joint owners or claimants under this chapter and the Texas Rules of Civil Procedure.

STATEMENT OF THE CASE

This suit was brought by Appellee pursuant to 10 U.S.C. § 1408 to partition Appellant's military retirement benefits. This is the second partition suit between these parties.

Appellant, James H. Powell, joined the Army Air Corps on December 3, 1940. On July 26, 1942, he married Appellee, Ruth Ann Powell. Appellant remained on active duty until December 31, 1960, thereby acquiring a right under 10 U.S.C. §§ 8911, 8929, and its predecessor statutes, to receive military retirement pay. On January 28, 1965, the parties entered an agreed decree of divorce, which decree awarded a substantial portion of the parties' community property to Appellee and provided for the payment of child support by Appellant. The decree was silent as to military retirement pay. Under Texas law, any rights which Appellee had in such benefits arose and were fixed at the time of divorce. See *Busby v. Busby,* 457 S.W.2d 551 (Tex. 1970). The parties' failure to expressly award a portion of Appellant's benefits to Appellee later proved to be in accordance with the applicable federal law governing military retirement benefits as interpreted in *McCarty v. McCarty,* 453 U.S. 210 (1981).

Since the parties' divorce in 1965, the Texas Supreme Court, ignoring possible preemptive issues, had declared in *Busby,* supra, that vested rights in military retirement benefits could be divided upon divorce, to the extent such benefits could

be characterized as community property. See Sage, "Military Retired Pay for Texas: A New Outlook", 7 St. Mary's L.J. 28 (1975) (examining the question of preemption). If any portion of the community property is not divided upon divorce, the parties remain joint owners of such property as tenants in common, which property may be partitioned in the same manner as any other jointly owned property. *Busby*, supra at pp. 554-555. On June 21, 1979, Appellee filed suit for partition of Lieutenant Colonel Powell's military retirement benefits.

In answering Appellee's first partition suit, Appellant raised a number of affirmative defenses. The most notable of these defenses was that a large portion of the retirement benefits were Appellant's separate property because the parties had been domiciled in a separate property state during a substantial portion of their marriage. *Gaulding v. Gaulding,* 503 S.W.2d 617 (Tex.App. 1973, no writ). Judgment was summarily rendered against Appellant after a pretrial hearing. The judgment awarded Appellee forty-six percent of Appellant's military retirement benefits, past and future and a money judgment for accrued benefits. (A-21). Lieutenant Colonel Powell appealed the trial court judgment, asserting four points of error based upon his defenses not tried by the lower court and a fifth point that the division of retirement benefits under Texas community property and partition laws had been preempted by the applicable federal law as interpreted by *McCarty v. McCarty,* 453 U.S. 210 (1981). The Court of Appeals agreed with the fifth point; and without addressing Appellant's other points of error, reversed and rendered the trial court judgment, holding that all past and future military retirement benefits should be solely vested in Appellant. *Powell v. Powell,* 620 S.W.2d 253 (Tex.App. 1981, error ref., n.r.e.). Application for writ of error filed by Appellee in the Texas Supreme Court was refused and the Court of Appeal's judgment became final.

On April 27, 1983, after the effective date of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (FSPA), Appellee filed her second partition suit against Appellee seeking forty-six percent of all past and future military retirement benefits accruing after July 1, 1981. (The origin of the July date is not known to Appellant. Presumably, Appellee intended to specify the date of the first pay period after June 25, 1981—the date specified in the FSPA). Appellant answered: (1) asserting the defense of res judicata; (2) attacking the applicability of the FSPA; or if found applicable, questioning a retroactive application of the statute to either the 1965 divorce suit or the 1981 partition suit in a constitutional manner without depriving Appellant of vested property rights established under preemptive federal laws applicable at the time of the parties' divorce and the rights established by the final judgment in *Powell v. Powell,* 620 S.W.2d 253 (Tex.App. 1981, error ref., n.r.e.); (3) asserting that a reinstatement of the prior trial court judgment would be a violation of the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution; and (4) reasserting all of Appellant's defenses raised in the first partition suit. Appellant then filed his motion for summary judgment with supporting documentation based upon the first three affirmative defenses. Appellee filed a counter motion for summary judgment requesting partition under the FSPA and a money judgment for military retirement pay received by Appellant since July 1, 1981. Appellant controverted Appellee's unsupported motion by raising factual issues under Appellant's defenses, asserting that if the case was not barred under the doctrine of res judicata then it should be retried under the law in effect at the time of the prior suit. The trial court overruled Appellant's motion and granted Appellee's motion entering substantially the same judgment it had entered in the first partition suit.

On appeal to the Court of Appeals for the Tenth Supreme Judicial District of Texas, Appellant raised seven points of error derived from Appellant's trial court defenses. These seven points are set forth in the Appellate Court's opinion (A-5,6). All points were overruled and the trial court judgment was affirmed. Appellant's Application for Writ of Error to the Texas Supreme Court asserting the same seven points of error (A-42) was refused and his motion for rehearing overruled on December 4, 1985.

The Court of Appeals stated that res judicata is inapplicable to matters or conditions arising after the first suit. The Court held that such subsequent matters or future conditions were created by the enactment of the FSPA which act "created a new fact, a change in the law and a new cause of action" (A-5). The courts also held that under *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982) benefits accruing while the parties were domiciled in a separate property state were community property. The effect of the Court's holding under *Cameron* was to apply a new law, § 3.63(b)(1) of the Texas Family Code, to the present case thereby depriving Appellant of a defense which would have been available in both the 1965 divorce and the 1981 partition suit. The remaining defenses were summarily dismissed. None of Appellant's Constitutional points of error were addressed by the Court of Appeals but were expressly overruled (A-6,8).

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are substantial for six reasons:

A) The Texas Court of Appeals has interpreted federal law in such a manner as to so severely depart from established principles of federal and state law as to result in manifest injustice requiring correction by this Court.

B) The lower court's decision interprets and applies the Uniformed Former Spouses' Protection Act, 10 U.S.C. § 1408, in an extensive retroactive fashion, which interpretation and retroactive application should be addressed by this Court.

C) The lower court's decision interprets and applies current community property laws in a retroactive fashion so as to redefine property rights vested under prior federal law thereby divesting this litigant of such rights and related defenses, which divestiture is prohibited by the Fifth and Fourteenth Amendments to the Constitution of the United States.

D) The Texas Court of Appeals has decided a federal question in a manner contrary to this Court's decision in *McCarty v. McCarty*, 453 U.S. 210 (1981).

E) There are conflicting decisions among the highest courts of the several states concerning the interpretation and application of 10 U.S.C. § 1408.

F) Unless the lower court's decision is corrected by this Court, property will continue to be taken from other persons similarly situated contrary to the protections of the Fifth and Fourteenth Amendments of the United States Constitution.

ARGUMENT

A.

The Court of Appeals decision not to apply the doctrine of res judicata to this case is unprecedented. It appears that the court's interpretation of federal law under the Uniformed Services Former Spouses' Protection Act (FSPA) is made in the context of other state court holdings in Texas concerning the application of *McCarty v. McCarty*, 453 U.S. 210 (1981). See *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970) (holding Air Force retirement benefits constitute community property sub-

ject to subsequent partition if not divided upon divorce); *Segrest v. Segrest*, 649 S.W.2d 610 (Tex. 1983) (refusing retroactive application of *McCarty*); and *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982) (declaring that the purpose of enacting the FSPA was to reverse the effect of *McCarty*). Whether any community property interest was established in Appellant's military retirement benefits, which interest became fixed at the time of the parties' divorce in 1965, is a question of federal law. This Court's holding in *McCarty* that the statutory scheme creating the right to receive military retirement benefits, preempted state law by virtue of Article VI, Clause 2 of the United States Constitution, was an interpretation of federal law, which law was in effect at the time the right to receive military retirement benefits was earned by Appellant. It follows that, if no community property interest could have arisen during the parties' marriage, because the applicable state law was preempted by federal law establishing the sole entitlement to such benefits in the military spouse, then no property right subject to partition became fixed at the time of divorce. A failure by the divorce court to divide these benefits did not result in a joint tenancy interest subject to being partitioned as described in *Busby*. When this point was challenged by Appellant in the first partition suit between the parties now before this court, the Texas Court of Appeals for the Tenth Supreme Judicial District correctly followed *McCarty*, holding that all past and future military retirement benefits were solely vested in Appellant. *Powell v. Powell*, 620 S.W.2d 253 (Tex.App. 1981, error ref. n.r.e.) (A-23).

The consequence of the lower court's decision in this case is that *Powell*, supra, has simply been set aside, although it is not void, voidable, nor erroneous. See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398-399, 69 L.Ed.2d 103, 101 S.Ct. 2424 (1981) [concurring opinion]. No procedural

mechanism or authority for such action was used except the authority granted under the FSPA. By interpreting the FSPA as simply eradicating *McCarty*, any pre-*McCarty* divorce wherein military retirement benefits were not divided, is now subject to a partition action. See *Jackson v. Green*, 700 S.W.2d 620 Tex.App. 13 Dist. 1985). It should be noted that there is no statute of limitations for partition suits. Any intervening partition suit determining the parties' rights in military retirement benefits will not prohibit this retroactive reach around *McCarty*. If the Texas court's interpretation is correct, the Congress did and can overrule prior court judgments including a decision of this Court. See *Cerro Metal Products v. Marshall*, 467 F.Supp. 869, 870-873 (E.D. Pa. 1979) aff'd 620 F.2d 964 (3rd Cir. 1980).

An examination of the authorities relied upon by the lower court in holding that this suit is not barred under the doctrine of res judicata bear scrutiny. See *Abbott Laboratories v. Gravis*, 470 S.W.2d 639 (Tex. 1972) (this case supports Appellant's position not Appellee's—Mrs. Gravis could not sue Abbott Laboratories a second time under the guise of a new cause of action). The Court of Appeals held that the FSPA created a new fact, a change in the law and a new cause of action. To support this proposition, the court cited *Muchard v. Berenson*, 307 F.2d 368 (5th Cir. 1961) which held that res judicata could not attach to a motion to transfer raised in a prior suit dismissed without prejudice and *United States v. Lubbock Independent School District*, 455 F.Supp. 1223 (N.D.Tex. 1978) which held that a reexamination of a prior desegregation decision was not barred by res judicata where the court retained continuing supervisory jurisdiction. The remaining cases are equally as distinguishable and unsupportive of the lower court's holding. The notion that a law can create new facts or that the granting of a new federal legislative cause of action can override the principles of claim preclusion is contrary to the decision ren-

dered by this Court in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981). Appellant has consistently argued that *Federated Department Stores* should be followed in this case.

In *Federated Department Stores*, this Court, citing *Hart Steel Co. v. Railroad Supply Co.*, 294, 299, 37 S.Ct. 506, 61 L.Ed. 1148 (1917) stated:

> "We have stressed that [the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice of public policy and of private peace, which should be cordially regarded and enforced by the courts . . ."

Id. at page 401.

The Texas Court of Appeals decision not to apply the doctrine of res judicata in this case and the Supreme Court of Texas' upholding of that decision in refusing to hear this case can only be interpreted to mean that the rights established by final judgment between the parties in the prior suit can be and have been annulled by the Congressional enactment of 10 U.S.C. § 1408. It has long been established that the private rights of parties vested by final judgment cannot be annulled by an Act of Congress. *Pennsylvania v. Wheeling Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855); *Inman v. Railroad Commission*, 478 S.W.2d 124, 128 (Tex.App. 1972, error ref'd n.r.e.). Prior to the decision in this case, and the decision in a strikingly similar case decided by the Austin Court of Appeals, *Trahan v. Trahan*, 682 S.W.2d 332 (Tex.App. 1984, error ref'd n.r.e.) now pending before this Court, the prohibition against reopening final judgments and the possible constitutional ramifications of the Texas courts' actions in these cases were recognized in Texas. See McKnight, "Closing the McCarty USFSPA Window: A Proposal for Relief from McCarty-Era Final Judgments", 63 Tex.L.Rev. 496, (1984).

The removal of the cornerstone of judicial restraint, res judicata, by the Texas courts so severely departs from established principles of federal and state law as to require correction by this Court.

B.

The lower court's decision applying 10 U.S.C. § 1408 in an extensive retroactive fashion, draws into question the constitutionality of such statute. This retroactive application should be addressed by this Court.

Appellant has maintained throughout this case that Congress did not intend to invalidate prior law nor did it purport to reinstate state law as it existed prior to the date of this Court's decision in the *McCarty* case. It appears that the Act was intended to apply, only to court orders as defined in the statutes which were rendered in post-*McCarty* divorces. "Court order" is defined by the FSPA as follows:

> (2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which
>
> (A) issued in accordance with the laws of the jurisdiction of that court;
>
> (B) provides for
>
> (i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b);

(ii) payment of alimony (as defined in Section 462(c) of the Social Security Act (42 U.S.C. 662(c)); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

The definition does not encompass a final judgment for partition but is only made applicable to final decrees of divorce. Appellant's construction of the statute is supported by the legislative history found in 8A U.S. Code Cong. 6 Ad.News, 7th Cong. 1569, 1573 (1982), which reads:

"In addition [sic], the conferees intend this provision to preclude recognition of changes to court orders finalized before the *McCarty* decision if those changes are effected after the *McCarty* decision and as a direct result of the enactment of the new Title X of this conference report. In other words, the courts should not favorably consider applications based on the enactment of this title to reopen cases *finalized before* the *McCarty* decision wherein military retired pay was not divided".

In both the present case and in *Trahan v. Trahan*, 682 S.W.2d 332 (Tex.App. 1984, error ref'd. n.r.e.), the FSPA has been interpreted as annulling this Court's decision in *McCarty* thereby allowing a reinstatement of state substantive law as it existed prior to *McCarty*. This pervasive retroactive mandate, according to the Texas courts, can be gleaned from the following provision of 10 U.S.C. § 1408(c)(1) which reads:

> (c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981 either as property solely of the member and his spouse in accordance with the law of the jurisdiction of such court.

When the clear language of the provisions relied upon are analyzed under the principles of statutory interpretation, the statute does not, especially in conjunction with the above quoted legislative history and definition of court order, evidence a clear legislative intent to replace the intent of a prior Congress. See *Consumer Product Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 117-118, 64 L.Ed.2d 776, 100 S.Ct. 205 (3rd Cir. 1980) (a prior legislature's intent cannot be supplanted by the intent of a subsequent legislature). To legislatively pervade the jurisdiction and powers of this Court, or to redefine property interests established over twenty years ago, is not readily apparent, or at best illustrates a naivete of community property as well as separate property state equitable distribution laws. See *United States v. Security Industrial Bank*, 103 S.Ct. 407, 408 (stating that a "law shall not be construed to eliminate property rights that existed before the law was enacted in the absence of an explicit demand from Congress). It appears that the 97th Congress did intend to allow state courts to award a portion of military retirement benefits in divorces occurring after the effective date of the Act for all pay periods on or after June 25, 1981, but that they did not intend a retroactive application which would arbitrarily and irrationally deny the Fifth and Fourteenth Amendment guarantees of due process discussed by this Court in *Pension Benefit Guaranty Corp. v. Gray and Company*, 467 U.S. 81 L.Ed.2d 601, 104 S.Ct. 2709 (1984), nor harshly disrupt persons' lives after twenty years. See *In the Matter of U.S. Finances, Inc. v. Pacific Telephone & Telegraph Company*, 594 F.2d 1275 (1979),

Nonetheless, the Texas courts have interpreted the FSPA in both this case and *Trahan* to permit retroactive application. Unless this Court determines the retroactive reach of 10 U.S.C. § 1408, the courts in Texas as well as other community and separate property states will continue to apply the statute in a retroactive fashion, without regard to the inequities and constitutional ramifications. See Appellant's argument under Point E, infra.

C.

By removing the bar on relitigation posed by the doctrine of res judicata and through a retroactive application of the Uniformed Former Spouses' Protection Act, the Texas courts have held that state substantive law, as it existed prior to *McCarty* has been reinstated. See *Allison v. Allison,* 29 Tex.S.Ct.J. 91 (Dec. 4, 1985, per curiam) (stating that the "rules of applicable law to the partition of military retirement benefits which control prior to the rendition of the *McCarty* decisions control the disposition of partition suits brought after the effective date of the USFSPA"). In conjunction with the retroactive application of the FSPA, the Court of Appeals held that certain current Texas laws are applicable to this case. Therefore, the rights established under prior law and any defenses related to such rights are no longer available to Appellant. Property rights established by virtue of the federal statutory scheme described in *McCarty* have been supplanted by a new statutory scheme under the FSPA, addressed in Appellant's preceding point. Therefore, the argument of federal preemption by 10 U.S.C. §§ 8911 and 8929, which established Appellant's right to receive military retirement benefits has been replaced by applicable community property statutes. One of these statutes, in particular, § 3.63(b)(1) of the Texas Family Code was not enacted until 1981 and did not become effective until September lst of that year. (For text of

statute prior to its amendment, see p. 5, supra). This section provides as follows:

> (b) In a decree of divorce or annulment the court shall also order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage:
>
> > (1) Property that was acquired by either spouse while domiciled elsewhere and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition. . .

Subparagraph (1) was first applied in *Cameron v. Cameron,* 641 S.W.2d 210 (Tex. 1982) by the Texas Supreme Court to property acquired by one of the parties in a separate property state. Prior to the enactment of § 3.63(b)(1) and the decision in *Cameron,* property earned in a separate property state by a spouse became that spouse's separate property. *Gaulding v. Gaulding,* 503 S.W.2d 617 (Tex.App. 1973); *Parson v. United States,* 460 F.2d 228 (5th Cir. 1972); and *Cameron v. Cameron,* 608 S.W.2d 748, 750 (Tex.App. 1980, writ granted). Such was the law at the time the parties to this suit were divorced in 1965 and at the time of the first partition suit in 1981. Despite Appellant's contentions that § 3.63(b)(1) could not be retroactively applied and that this case, if subject to relitigation at all, should be tried in accordance with the law in effect at the time of the prior suits, the Court of Appeals expressly overruled this point (A-6). Prior to the enactment of § 3.63(b)(1), Appellee would have only been entitled to twenty-five percent or less of Appellant's military retirement benefits, assuming any entitlement would not have been preempted by federal law. The application of § 3.63(b)(1) to this case, instead of its

predecessor statute, resulted in a divestment of at least twenty-one percent of Appellant's retirement benefits. Appellant's defense that Appellee was entitled to only twenty-five percent or less was denied him. One cannot be deprived of a vested right in a defense without a violation of constitutional guarantees. See *People of the State of Illinois Ex Rel. Fred L. Endicott v. Prather,* 343 Ill. 443, 175 N.E. 658, 74 A.L.R. 874, 877 (Ill. 1931). The court's interpretation of § 3.63(b)(1) as applicable to Appellant's rights in his military retirement benefits and the refusal to allow him his defenses under prior law is a denial of the due process clause found in the Fifth and Fourteenth Amendments and is therefore repugnant to the Constitution and laws of these United States.

D.

The Texas Court of Appeals has decided a federal question in a manner contrary to this Court's decision in *McCarty v. McCarty,* 453 U.S. 210 (1981). The *McCarty* case interpreted the federal statutory scheme applicable to military retirement benefits as it had existed since its creation under statutes amended in 1956 and their predecessor statutes. Lieutenant Colonel Powell acquired his right to receive military retirement benefits under such statutes, which preempted Appellee's entitlement to any portion of the military retirement benefits under Texas community property laws as they existed at the time of the parties' divorce in 1965. The Texas Court of Appeal's failure to acknowledge the continued applicability of this Court's decision in McCarty has resulted in a holding by the Court of Appeals in conflict with a decision of this Court and a denial of Appellant's rights under federal law.

E.

There are conflicting decisions among the highest courts of the several states concerning the interpretation and application of 10 U.S.C. § 1408. In accordance with Appellant's position, the Supreme Court of Kentucky in *Bishir and Britt v. Bishir,* 698 S.W.2d 823 (Ky. 1985), found that the Uniformed Former Spouses' Protection Act does not contain any authority to compel the opening of a final decree. The court based this finding on the fact that, at the time of the Bishir's divorce, military retirement benefits could not be equitably divided under federal law, citing *Russell v. Russell,* 60 S.W.2d 33 (Ky.App. 1980), cert. den. 453 U.S. 922, 69 L.Ed.2d 1004, 101 S.Ct. 3158 (1981), which case confirmed the view set forth in *McCarty.* The South Dakota Supreme court held in *Moller v. Moller,* 356 N.W.2d 909 (S.D. 1984) that the FSPA contained no authority to modify a seven year old divorce, because such action would constitute a new judgment. Equitable distribution was refused by the North Carolina Court of Appeals for the reason that the FSPA could not be applied to a suit filed prior to the effective date of that Act. *Johnson v. Johnson,* 328 S.E.2d 876 (N.C.App. 1985). It appears in scanning other state court decisions that California, New Mexico and Wiconsin are in accordance with Texas in holding that 10 U.S.C. § 1408 had the effect of simply erasing the *McCarty* decision thereby allowing the reopening of divorces finalized prior to *McCarty.* Eg. *Thorpe V. Thorpe,* 376 N.W.2d 233 (Wis.App. 1985) the FSPA was retroactively applied to a 1977 divorce). The majority of states appear to allow a reopening of post-*McCarty* divorces if a procedural mechanism, generally the equivalent to federal Rule 60(b), allows the reopening and the party demonstrates extraordinary circumstances of hardship, injustice or substantial change. See *Edsall v. Superior Court of the State of Arizona,* 693 P.2d 895 (Ariz. 1984) and *In Re Marriage of Yates,* 365 N.W.2d 49 (Ia.App. 1985).

The Court of Appeals has evaded any discussion of the question of retroactivity presented by Appellant, although it is clear the FSPA was retroactively applied; has not searched for any procedural authority authorizing review of the original divorce in this suit or authorizing a reopening of a final partition judgment; nor has it required any showing by Appellee of any harm or prejudice. This appears to be justified on the basis that the original divorce is of no consequence, except to the extent that it failed to mention military retirement benefits which gave Appellee a tenancy in common right in the property and therefore a right to partition. The fact that Appellant believed in, structured his life around, paid taxes on, and paid child support from his benefits which were not claimed until the filing of the first partition suit in 1979, which reliance was reconfirmed by final judgment in *Powell v. Powell,* 620 S.W.2d 253 (Tex.App. 1981, error ref., n.r.e.), can only be presumed to be unimportant in light of the Court of Appeal's refusal to apply res judicata and failure to analyze the constitutional ramifications of retroactivity. With the exception of California, New Mexico, and possibly Wisconsin, the cases dealt with by other states involved post-*McCarty* divorces, as provided by the FSPA, wherein equities might possibly be readjusted. However, even after finding that in light of the FSPA, the property divisions might be reconsidered, if the proper procedural mechanism allowed such reopening, a number of courts held that no adjustment should be made. See *Alexander v. Alexander,* 484 N.E.2d 1068 (Oh.App. 1985).

In a 1981 Washington state divorce suit, the Supreme Court of that state held that the Former Spouses Protection Act did not violate the military member's due process guarantees because he did not expect to receive his military retirement benefits until the time of his divorce, after the *McCarty* decision. Certainly that is not the case here. It seems absurd that the only

relief Appellant might be entitled to would be a suit against his divorce attorney for failing to know the ramifications of not mentioning military retirement in the divorce decree. To expect a practitioner to know the ramifications of what his actions might be under statutes to be enacted many years later does, indeed, sound far-fetched. But see *Aloy v. Mash*, 696 P.2d 656 (Cal. 1985).

It is clear that many states have dealt with the Former Spouses Protection Act in a well-reasoned and well-supported manner, but the extent of the effects of the statute's retroactivity has been inconsistently and, as in this case and others, very unfairly applied. The issue of retroactivity should not be subject to inconsistent state laws, methods and procedures. The limits of such retroactivity has not been, but should be, addressed by this Court.

F.

Under both federal and state law, it appears well established that Appellant acquired vested property rights in his military retirement benefits. *Taggart v. Taggart*, 552 S.W.2d 442 (Tex. 1977). Appellant completed his service in reliance on such benefits. Compare *United States v. Larionoff*, 431 U.S. 864, 53 L.Ed.2d 48, 97 S.Ct. 2150 (1977). Further, Lieutenant Colonel Powell has relied upon his sole entitlement to such benefits since his divorce in 1965 which reliance was confirmed by final judgment on August 6, 1981. To now allow Congress to retrospectively change Appellant's contract establishing such rights constitutes a taking of property without compensation and without due process, guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution. *United States v. Security Industrial Bank*, 103 S.Ct. 407 (1982); *Green v. United States*, 376 U.S. 149 (Ct. of Claims, 1964). This case

is not an isolated incident. See *Trahan v. Trahan*, 682 S.W.2d 332 (Tex.App. 1984, error ref'd. n.r.e.) and *Jackson v. Green*, 700 S.W.2d 620 (Tex.App. 1985).

CONCLUSION

Appellant most respectfully prays this Court to note probable jurisdiction and set this case for plenary consideration with briefs on the merits and oral argument. In the alternative, should this Court decide that this case does not properly come within the Court's appellate jurisdiction, Appellant prays that the jurisdictional statement be considered as an application for writ of certiorari and that certiorari be granted.

Respectfully submitted,

JULIANNE MAY YOUNG
State Bar No. 22199400
3000 Briarcrest Drive, #602
Bryan, Texas 77802
(409) 776-9551

Attorney for Appellant

APPENDIX

AFFIRMED 28 FEBRUARY 1985
NO. 10-84-184-CV

IN THE COURT OF APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT WACO

JAMES H. POWELL,
Appellant

v.

RUTH ANN POWELL,
Appellee

From 85th Judicial District Court
Brazos County, Texas

OPINION

This is an appeal from summary judgment decreeing appellee Ruth Ann Powell entitled to recover 46% of the disposable U.S. Air Force retired pay of appellant James H. Powell from and after July 1, 1981, to March 16, 1984, in the amount of $15,441.42; and 46% of appellant's disposable retired pay from and after March 16, 1984.

This is the second time this matter between these parties has been before this court. See Powell v. Powell, CCA (Waco) NRE, 620 S.W.2d 253.

Appellant James H. Powell entered military service December 3, 1940. Appellant and appellee were married July 26, 1942. Appellant served continuously from December 3, 1940, in the military service until December 31, 1960, since which date he has been retired and drawing military retired pay from the United States government. The parties were divorced on February 2, 1965, in the 85th District Court in Brazos County. The divorce judgment was silent as to any division of the military retirement pay. The parties were married during 222 months of the 241 months of appellant's vested retirement time.

Appellee brought suit in 1979 against appellant seeking judgment for 46% of all retirement pay appellant had received since the divorce, and declaratory judgment that she was entitled to 46% of all appellant's future benefits.

On October 1, 1980, the trial court rendered judgment for appellee for 46% of all retirement pay received by appellant from the date of divorce to date of judgment, plus 46% of all future retirement pay.

Appellant appealed such judgment on 5 points asserting among other matters: 1) the parties were married July 16, 1942, in Illinois (where military retirement benefits are separate property) and lived in such state for nearly eight years; 5) the system of military retirement benefits established by Congress preempts the State of Texas from treating military retirement pay as community property divisible on divorce.

The court held point 5, supra, dispositive of the case, and following the mandate of the United States Supreme Court in McCarty v. McCarty, reversed the trial court's judgment and rendered judgment that appellee take nothing. Powell v. Powell, supra, on August 6, 1981. Rehearing was denied September 4, 1981, and the Texas Supreme Court refused application (NRE) for writ of error on December 1, 1981.

On September 8, 1982, the United States Congress passed the "Uniform Services Former Spouses Protection Act" (FSPA) which provides in pertinent part:

> "***a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court".

On April 7, 1983, appellee Ruth Ann Powell filed this case in the 85th District Court in Brazos County, seeking recovery of 46% of the retirement benefits of appellant after June 26, 1981; and for declaratory judgment for 46% of said retirement benefits to accrue in the future. Appellant answered asserting, among other matters, appellee's claim was barred by res judicata in that on August 6, 1981, this court held appellee "not entitled to any part of [appellant's] military retirement pay". [citing 620 S.W.2d 253, NRE]; that the parties did not live in a community property state during eight years of their marriage; and that the trial court took the military retirement benefits into consideration in dividing the parties' property and setting child support payments in the original divorce decree.

Thereafter appellant moved for summary judgment that appellee take nothing, attaching copies of the trial court judgment of August 6, 1981; this court's judgment reversing such judgment and rendering judgment [appellee] take nothing; and the Supreme Court's order that application for writ of error be refused in such case. Appellee also moved for summary judgment for 46% of appellant's retirement pay from July 1, 1981, to date, plus decree that appellant be ordered to pay 46% of future retirement benefits to appellee.

Appellant filed opposition to appellee's motion for summary judgment asserting, among other matters, the prior case was res judicata of the present case; the parties were not

domiciled in a community property state for the entire duration of their marriage which was a fact issue and [would affect the percentage of appellant's military retirement pay appellee was entitled to, if any].

Attached to such opposition was appellant's affidavit that the parties lived in Illinois for nearly 8 years of their marriage; and that the retirement benefits were considered by the divorce court in 1965 in dividing the parties' property and in determining the amount of child support appellant was required to pay. Further attached was the affidavit of Honorable John L. Sandstedt, who represented appellant in the prior case between the parties, to the effect that in the prior case the defenses of residency of the parties [and other defenses] were not reached because the decision was predicated on [Point 5] and the United States Supreme Court's decision in McCarty v. McCarty, 453 U.S. 210.

The trial court on October 2, 1984, overruled appellant's motion for summary judgment; found appellee "is entitled to recover under the Uniform Services Former Spouses Protection Act the disposable retired pay of [appellant] accruing from and after July 1, 1981"; and rendered summary judgment appellee recover 46% of the disposable retired pay accrued and accruing on behalf of appellant from and after July 1, 1981; calculated to March 16, 1984, to be $15,441.82; and further decreed appellee recover 46% of appellant's retirement pay after March 16, 1984.

Appellant appeals on 7 points.

1) The trial court erred in overruling [appellant's] motion for summary judgment based on the final judgment in Powell v. Powell, CCA (Waco) NRE, 620 S.W.2d 253, which bars appellee's suit under the doctrine of res judicata.

2) The trial court erred in granting [appellee's] motion for summary judgment based on the Uniform Services Former Spouses Protection Act because the act is not applicable to the parties in this case.

3) The trial court erred in granting [appellee's] motion for summary judgment because the FSPA as applied in this case takes appellant's property without compensation and without due process of law in violation of the 5th and 14th Amendments to the U.S. Constitution.

4) The trial court erred in overruling [appellant's] motion for summary judgment because the FSPA as applied in this case takes appellant's property without due process of law in violation of the 5th and 14th Amendments to the U.S. Constitution.

5) The trial court erred in granting [appellee's] motion for summary judgment because the Uniform Declaratory Judgment Act is inapplicable to the controversy in this case.

Res judicata will operate as a bar only to matters *actually* raised or that *could have* been raised in the previous litigation. Abbot. Laboratories v. Gravis, S.Ct., 470 S.W.2d 639. As to matters which arise subsequently, the prior judgment will not be res judicata. Fort Worth Stockyards Co. v. Brown, CCA (Ft. Worth) NWH, 161 S.W.2d 549; Franklin v. Rainey, CCA (Dallas) NWH, 556 S.W.2d 583. Our Supreme Court expresses the rule thusly: "The judgment is res judicata only of present and not future conditions." Cowling v. Collegan, S.Ct., 312 S.W.2d 943.

The enactment by Congress of the FSPA created a new fact, a change in the law and a new cause of action. See also: Muchard v. Berenson, 307 F.2d 368; State Farm Mutual Auto

Ins. Co. v. Duel, 324 U.S. 154; U.S. v. Lubbock Ind. Sch. Dist., 435 F.Supp. 1223; Colorado Co. Fed. S&L Assn. v. Lewis, CCA (Austin) NRE, 498 S.W.2d 723.

The Declaratory Judgment Act provides a plenary remedy. United Service Life Ins. Co. v. Delaney, S.Ct., 396 S.W.2d 855. We think the act properly applicable here where a controversy exists as to the rights of parties under the FSPA and Texas law.

Appellant's points 1 through 5 are overruled.

> 6) The trial court erred in granting [appellee's] motion for summary judgment in that appellee's summary judgment proof did not establish appellee's entitlement to judgment as a matter of law.
>
> 7) The trial court erred in granting summary judgment because the FSPA and Judgment Act as applied to this case denies appellant due process and equal protection guaranteed by the 5th and 14th Amendments to the U.S. Constitution.

Appellant contends under these points that the trial court's award of 46% of appellant's retirement pay to appellee is unsupported by the summary judgment evidence; that his affidavits raise fact issues as to the correct percentage of appellee's entitlement [if any] by showing the parties lived some [8 or 13] years of the marriage in separate property states for which reason the amount of military retirement pay acquired by appellant while domiciled in a separate property state should be considered appellant's separate property.

We reject this contention. Our Supreme Court in Cameron v. Cameron, 641 S.W.2d 210 in an almost identical factual situation stated: "We recognize that property acquired in common law jurisdiction has historically been termed 'separate' property, but we hold that the property spouses acquire during

marriage, except by gift, devise or descent should be divided upon divorce in Texas in the same manner as community property, irrespective of the domicile of the spouses where they acquire the property". In Cameron, entitlement to military retirement pay [and bonds] was all or part acquired while the spouses were living in separate property states. The Supreme Court rendered judgment awarding the wife her share of the military retirement pay, but only from June 25, 1981. Appellant contends his defense that the trial court took the military retirement benefits into consideration when dividing the parties' property and fixing child support payments cannot be adjudicated here by summary judgment. The military retired pay was not divided or mentioned in or by the divorce decree in 1965. Thus the husband and wife became joint owners thereof. Busby v. Busby, S.Ct., 457 S.W.2d 551.

The trial court's judgment awarded appellee 46% of appellant's disposable retired pay from and after July 1, 1981, to March 16, 1984, and calculated same as being *$15,441.82;* and further ordered appellant and the Secretary of the Air Force or his authorized agent to pay appellee 46% of all appellant's disposable retirement pay from and after March 16, 1984.

Appellant complains of the amount of the judgment and asserts it differs from the amount asked for in appellee's motion for summary judgment, and does not address the amount of actual taxes paid by appellant.

The FSPA defines "Disposable Retired Pay" as the total retired pay to which the member is entitled less [as pertinent here] amounts which are properly withheld for federal income tax purposes, are deducted as government life insurance premiums, and are deducted because of an election to provide for an annuity for a spouse.

The summary judgment record before us reflects in appellant's answers to appellee's interrogatories the amounts of retired pay received by appellant for the pertinent periods and the amounts withheld by the government for survivor's benefit, income tax and allotment for life insurance. The careful trial judge computed the judgment to $15,441.41, by deducting the survivor's benefit, federal income tax withheld and life insurance allotment from the total of the check appellant received.[1]

Points 6 and 7 are overruled.

AFFIRMED

DO NOT PUBLISH /s/

Frank G. McDonald
Chief Justice

---

[1]Appellee is probably entitled to 46% of the amount of the checks actually received by appellant because the survivor's benefit, income tax, and insurance allotment, have been withheld from appellant's total entitlement, and the check he receives represents his disposable retired pay, (which for the period involved we calculate to be $19,736.14), but appellee presents no point on this.

NO. 24,561

RUTH ANN POWELL
vs.
JAMES H. POWELL

IN THE 85TH JUDICIAL DISTRICT COURT OF
BRAZOS COUNTY, TEXAS

FINAL SUMMARY JUDGMENT

On March 26, 1984, the Court heard the Motions For Summary Judgment filed in this cause by both the Plaintiff, Ruth Ann Powell, and by the Defendant, James H. Powell. All parties appeared by and through their respective counsel. The Court, after examining the pleadings, amended pleadings, Plaintiff's Motion and Defendant's Amended Motion For Summary Judgment, Summary Judgment Responses, Supporting Affidavits, judgment evidence, including the answers to interrogatories filed and made a part of the record prior to the hearing, and after hearing the oral arguments of counsel and considering their written briefs, is of the opinion and finds that no issues of fact exist and that the Plaintiff, RUTH ANN POWELL, is entitled to summary judgment and that the Motion For Summary Judgment filed by the Defendant, JAMES H. POWELL, should be denied as follows:

The Court finds that it has both in personam and subject matter jurisdiction over the parties and this matter and is sitting as a court of competent jurisdiction.

The Court further finds and certifies that the provisions and rights of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. 501 et seq.) have been observed.

The Court further finds that the Plaintiff is entitled to recover under the Uniformed Services Former Spouses' Protec-

tion Act the disposable retired pay of Defendant accruing from and after July 1, 1981.

IT IS ORDERED, ADJUDGED, AND DECREED that the Plaintiff, RUTH ANN POWELL, is and shall be entitled to and shall have and recover from the Defendant, JAMES H. POWELL, forty-six percent (46%) of the disposable retired pay accrued and accruing in the U.S. Air Force account for and on behalf of JAMES HENRY POWELL, social security no. .....-.....-....., from and after July 1, 1981 to March 16, 1984, as calculated in the Plaintiff's Motion For Summary Judgment, said sum being $15,441.82; that RUTH ANN POWELL, have and recover of and from the Defendant, JAMES H. POWELL, and the Secretary of the Air Force or his authorized agent is ordered to pay to RUTH ANN POWELL, forty-six percent (46%) of all of the Defendant's disposable retirement pay from and after March 16, 1984; the Plaintiff, RUTH ANN POWELL, shall have and recover of the Defendant, JAMES H. POWELL, said sums as set forth above, together with interest from the date below written at the maximum allowable rate of interest per annum (which is ten [10] percent) as set by TEX. REV. CIV. STAT. ANN. art. 5056-1.05 (Supp. 1983-1984) until paid, and costs of court, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant, JAMES H. POWELL's Motion For Summary Judgment is in all things denied.

All other relief requested and not expressly granted is denied.

SIGNED this 2nd day of October, 1984.

/s/

W. T. McDonald, Jr.
District Judge

COURT OF APPEALS
Tenth Supreme Judicial District
P.O. Box 1606
Waco, Texas 76703-1606

March 28, 1985

Honorable Julie May Young
Davis & Davis
P.O. Box 1209
Bryan, Texas 77806

Honorable John C. Hampton
D. Brooks Cofer, Jr., Inc.
P.O. Box 3520
Bryan, Texas 77805

Re: Cause No. 10-84-184-CV
James H. Powell v. Ruth Ann Powell
From: Brazos County

Dear Attorneys:

Appellant's Motion for Rehearing in the above cause was overruled on March 28, 1985 in the following words:

"It is ordered that Appellant's Motion for Rehearing be, and hereby is, overruled."

Very truly yours,

Robert G. Watts, Clerk

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

July 10, 1985

Ms. Julie May Young
Davis & Davis
3000 Briarcrest Drive, Suite 602
Bryan, TX 77802

Mr. John C. Hampton
D. Brooks Cofer, Jr., Inc.
P.O. Box 3520
Bryan, TX 77805

RE: Case No. C-4123

STYLE: JAMES H. POWELL
v. RUTH ANN POWELL

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

MARY M. WAKEFIELD, *Clerk*

By /s/ _____
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

December 4, 1985

Ms. Julie May Young
Davis & Davis
3000 Briarcrest Drive, Suite 602
Bryan, TX 77802

Mr. John C. Hampton
D. Brooks Cofer, Jr., Inc.
P.O. Box 3520
Bryan, TX 77805

RE: Case No. C-4123

STYLE: JAMES H. POWELL
v. RUTH ANN POWELL

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

MARY M. WAKEFIELD, *Clerk*

By /s/ _____
Deputy

MANDATE

THE STATE OF TEXAS
TO THE 85TH JUDICIAL DISTRICT COURT OF
BRAZOS COUNTY, GREETING:

Before our Court of Appeals on the 28th day of February A.D. 1985, the cause upon appeal to revise or reverse your judgment between

JAMES H. POWELL, *Appellant*

Trial Court No. 24,561
and
Court of Appeals No. 10-84-184-CV

RUTH ANN POWELL, *Appellee*

was determined; and therein our said Court of Appeals made its order in these words:

"This cause came on to be heard on the transcript of the record, and the same being considered, because it is the opinion of this Court that there was no error in the judgment of the court below; it is therefore ordered, adjudged and decreed that the judgment entered on the 2nd day of October, 1984 be, and hereby is, affirmed. It is further ordered that Appellant James H. Powell, who has a cash deposit with the District Clerk of Brazos County, Texas in lieu of an appeal bond, pay all costs in this behalf expended, and this decision be certified below for observance."

WHEREFORE WE COMMAND YOU to observe the order of our said Court of Appeals in this behalf, and in all things to have it duly recognized, obeyed and executed.

WITNESS the Hon. FRANK G. McDONALD, Chief Justice of our said Court of Appeals for the Tenth Supreme Judicial District of Texas, with the seal thereof annexed, at the City of Waco, this 11th day of December, A.D. 1985.

ROBERT G. WATTS, *Clerk*

By: _____
Deputy

No. C-4123

IN THE SUPREME COURT OF TEXAS AUSTIN, TEXAS

RECEIVED
IN SUPREME COURT
OF TEXAS

JAN 17 1986

MARY M. WAKEFIELD, Clerk
By_____Deputy

JAMES H. POWELL,
Petitioner,

V.

RUTH ANN POWELL,
Respondent

No. 10-84-184-CV

IN THE COURT OF APPEALS TENTH SUPREME JUDICIAL DISTRICT WACO, TEXAS

JAMES H. POWELL,
Appellant,

V.

RUTH ANN POWELL,
Appellee

NOTICE OF APPEAL

Notice is hereby given that James H. Powell, Appellant in the above named cause hereby appeals to the Supreme Court of the United States from the judgment and orders of the Court of Appeals for the Tenth Supreme Judicial District sitting in Waco, Texas in said Court's Cause No. 10-84-184-CV in which judgment was entered on February 28, 1985 and from the denial of Application For Writ Of Error to review said judgment by the Supreme Court of Texas under its cause No. C-4123 on July 10, 1985 which order is the final judgment or decree rendered by the highest court of the state in which a decision could be had. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ _____

Julianne May Young
Attorney for Appellant

PROOF OF SERVICE

I, John C. Hampton, attorney for Appellee, Ruth Ann Powell, hereby acknowledge that a copy of the above Notice of Appeal was personally served upon Appellee, through me, her attorney of record this 15th day of January, 1986.

By /s/ _____

John C. Hampton
Attorney for Appellee

No. C-4123

IN THE SUPREME COURT OF TEXAS AUSTIN, TEXAS

FILED IN
COURT OF APPEALS
Tenth District-Waco, Texas
FILE MARKED COPY
JAN 10 1986
ROBERT G. WATTS, CLERK

JAMES H. POWELL,
Petitioner,

V.

RUTH ANN POWELL,
Respondent

No. 10-84-184-CV

IN THE COURT OF APPEALS TENTH SUPREME JUDICIAL DISTRICT WACO, TEXAS

JAMES H. POWELL,
Appellant,

V.

RUTH ANN POWELL,
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/s/ _____

Julianne May Young
Attorney for Appellant

PROOF OF SERVICE

I, John C. Hampton, attorney for Appellee, Ruth Ann Powell, hereby acknowledge that a copy of the above Notice of Appeal was personally served upon Appellee, through me, her attorney of record this 15th day of January, 1986.

By /s/ _____

John C. Hampton
Attorney for Appellee

JAMES H. POWELL,
Appellant,

V.

RUTH ANN POWELL,
Appellee.

No. 6310.

Court of Civil Appeals of Texas, Waco.

Aug. 6, 1981.

Rehearing Denied Sept. 4, 1981.

Former wife brought suit against former husband seeking judgment for 46% of all retirement pay former husband had received since divorce, and declaratory judgment to effect that she was entitled to 46% of all of former husband's future retirement benefits. The 85th District Court, Brazos County, W. T. McDonald, Jr., entered judgment in favor of former wife, and appeal was taken. The Court of Civil Appeals, James, J., held that system of military retirement benefits established by Congress preempted State of Texas from treating military retirement pay as community property divisible upon divorce, and thus former wife was not entitled to any part of former husband's military retirement pay.

Reversed and rendered.

Divorce ∓ 252.3(4)

States ∓ 4.10

System of military retirement benefits established by Congress preempted state of Texas from treating military retirement pay as community property divisible upon divorce, and thus

former wife was not entitled to any part of former husband's military retirement pay.

John L. Sandstedt, Sandstedt & Davis, Bryan, O. Shelton Coleman, Coleman & Ward, Garland, for appellant.

D. Brooks, Cofer, Jr., Cofer, Edwards & Vance, Inc., Bryan, for appellee.

OPINION

JAMES, Justice.

This is a case wherein the divorced former wife of a retired military man seeks to establish a one-half interest in her former husbands military retirement pay.

James H. Powell and Ruth Ann Powell were married July 26, 1942, while he was in the military service. He had entered military service on December 3, 1940. Mr. Powell served in the U.S. Armed Forces continuously from the time of his entry therein, until December 31, 1960, since which last named date he has been retired and drawing military retirement benefits from the United States Government. The parties were divorced on February 2, 1965, in the 85th District Court of Brazos County in Cause Number 18,196-A. Said divorce judgment was silent as to any division of military retirement pay. The parties were legally married during 222 months of his 241 months of vested retirement time.

Ruth Ann Powell, Plaintiff-Appellee herein, brought this suit in the 85th District Court of Brazos County against her former husband James H. Powell seeking judgment for 46% of all the retirement pay Mr. Powell had received since the divorce, same being 46% of $116,852.88 or $53,752.32. In addition thereto, Plaintiff Mrs. Powell sought a declaratory judgment to the effect that she was entitled to 46% of all of Mr. Powell's future retirement benefits.

Trial was had before the court without a jury after which the trial court entered its judgment that Plaintiff Mrs. Powell recover $53,752.32 from Defendant, same being 46% of all retirement pay received by Defendant from the time of the divorce to date, plus 46% of all future retirement pay to be received by Defendant Mr. Powell from and after the date of judgment. The trial court's judgment contained specific findings of fact along the lines hereinabove stated.

Defendant-Appellant appeals upon five points of error; however, since we believe his fifth point is dispositive of the case, we will discuss only his fifth point. By said point of error, Appellant contends that the system of military retirement benefits established by the Congress pre-empts the State of Texas from treating military retirement pay as community property divisible upon divorce. In view of the recent decision of the United States Supreme Court in *McCarty v. McCarty*, (1981), ... U.S. ....., 101 S.Ct. 2728, 69 L.Ed.2d 589, we sustain Appellant's fifth point of error and thereby reverse and render the trial court's judgment to the end that Plaintiff-Appellee Ruth Ann Powell take nothing.

McCarty involved an Army colonel who, having served 18 of the 20 years required for military retirement with pay, filed a petition in the California Superior Court for dissolution of his marriage to the Appellee in that case. In his petition Col. McCarty requested that his military retirement benefits be confirmed to him as his separate property. The Superior Court held, however, that such benefits were subject to division as quasi-community property, and accordingly ordered McCarty to pay to Mrs. McCarty a specified portion of the benefits upon retirement. Under the dissolution decree, Mrs. McCarty was entitled to approximately 45% of Col. McCarty's retirement pay. The California Court of Appeal affirmed the Superior Court's judgment, rejecting Col. McCarty's contention that because the Federal scheme of military retirement benefits pre-

empts state community property law, the Supremacy Clause precluded the trial court from awarding Mrs. McCarty a portion of his retired pay. The United States Supreme Court reversed the California Court of Appeal and held that the Federal law precludes a state court from dividing military retirement pay pursuant to state community property laws. Moreover, *McCarty* held that there is a conflict between the terms of the Federal military retirement statutes and the community property right asserted by Mrs. McCarty that the military retirement system confers no entitlement to retired pay upon the retired member's spouse, and does not embody even a limited "community property concept"; that retired pay is the personal entitlement of the retiree; and that the application of community property principles to military retired pay threatens grave harm to "clear and substantial" Federal interests.

It may be pointed out that the Texas case of *Trahan v. Trahan* (Tex.Civ.App.Texarkana 1980) 609 S.W.2d 820, is a case wherein the divorced wife sought to establish a community interest in her former husband's military retirement pay. She was awarded a money judgment in the trial court which was affirmed by the Court of Civil Appeals subject to being reformed in an aspect not material here. In *Trahan* the husband contended that his ex-wife had no cause of action because under Federal law military retirement benefits are not community property subject to division by a Texas Court. The Court of Civil Appeals rejected this contention. On July 8, 1931, the Supreme Court of Texas granted a writ of error upon this point, which at this time is still pending.

It is our view that the U.S. Supreme Court's decision in *McCarty* is dispositive of the case at bar, and that Plaintiff-Appellee Mrs. Ruth Ann Powell is not entitled to any part of Mr. Powell's military retirement pay.

We therefore reverse the trial court's judgment and render judgment that Plaintiff-Appellee take nothing.

REVERSED AND RENDERED.

10 U.S.C. § 1408

(a) In this section:

(1) "Court" means—

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in Section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in Section 462(b) of the Social Security Act (42 U.S.C. 662(b));

(ii) payment of alimony (as defined in Section 462(c) of the Social Security Act (42 U.S.C. 662(c)); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under Chapter 61 of this title) less amounts which—

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section—

(1) service of a court order is effective if—

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order—

(A) Is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing of its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment,

in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, of (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer pay specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin no later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as a result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired or retainer pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) (sic) such court orders on a first-come, first-served basis. Such court

orders shall be satisfied (subject to the limitations of paragraph (1)) (sic) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall—

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired, or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of—

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (b) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security

Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as the Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired or retainer pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with

respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired or retainer pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (b) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 695) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member,

spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

(Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 790. As Amended Pub.L. 98-525, Title VI, 643(a)-(d), Oct. 19, 1984, 98 Stat. 2547, 2548.)

IN THE DISTRICT COURT OF
BRAZOS COUNTY, TEXAS
85TH JUDICIAL DISTRICT

NO. 18,196-A

JAMES H. POWELL
VS.
RUTH ANN POWELL

IN THE DISTRICT COURT OF
BRAZOS COUNTY, TEXAS
85TH JUDICIAL DISTRICT

NO. 22,067

RUTH ANN POWELL
VS.
JAMES H. POWELL

JUDGMENT

Cause Number 18,196-A is a divorce action, and Cause Number 22,067 is a suit for division of community property. Hearing was held on August 6, 1980, but the Court gave each party until August 18, 1980, to file objections to the pleadings; both parties were represented and present:

The Court, having considered the pleadings and evidence of both parties, finds:

1) That Cause Numbers 18,196-A and 22,067 are consolidated into Cause Number 18,196-A.

2) That the Judgment dated February 2, 1965, in Cause Number 18,196-A is silent as to any division of military retirement as community property.

3) That the Defendant, James H. Powell, was a resident of the State of Texas upon entry into the U.S. Armed Services on or about December 3, 1940.

4) That the Defendant, James H. Powell, was a resident of the State of Texas, when he married the Plaintiff on July 26, 1942.

5) That the Defendant, James H. Powell, was a resident of the State of Texas, when he retired from the U.S. Air Force on December 31, 1960.

6) That the Plaintiff and Defendant were legally married for 222 months of his 241 months of vested retirement time.

7) That since the divorce between the parties on February 2, 1965, the Defendant has received approximately $116,852.88 in military retirement pay and continues to draw said military retirement pay.

8) That the Plaintiff is entitled to receive 46% of the monies received by Defendant and 46% of Defendant's military pay in the future.

9) That the Defendant made no renunciation of the cotenancy until he filed an Original Answer to Plaintiff's Original Petition.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the parties share a community interest in the United States Air Force retirement proceeds earned as a result of James H. Powell's military service, that such retirement proceeds were left undivided at the time of the parties' divorce, that such retirement proceeds thereupon became a joint tenancy

or tenancy in common, and that 46%, that is one-half of 222/241ths, of such Air Force retirement benefits paid or to be paid since the time of the parties' divorce, should be paid to Ruth Ann Powell.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Ruth Ann Powell have and recover of and from James H. Powell judgment in the sum of $53,752.32, for which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that James H. Powell shall immediately upon entry of this decree execute a Limited Power of Attorney granting to W. D. Burley and his successors to the Office of District Clerk of Brazos County, Texas, the exclusive and irrevocable authority and power to receive and dispense all money issued to James H. Powell by the United States Government in the form of a retirement pay earned and accrued as a result of James H. Powell's service in the United States Air Force.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that immediately upon entry of this decree, James H. Powell shall instruct the Government of the United States of America to send each and every payment thereafter made to James H. Powell for retirement benefits earned and accrued as a result of his service in the United States Air Force directly to the District Clerk of Brazos County, Texas, at the Brazos County Courthouse in Bryan, Texas.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that promptly upon receipt of each and every such retirement payment as discussed above, the District Clerk of Brazos County shall endorse and deposit such payment into the Registry of this Court and shall thereafter promptly issue to Ruth Ann Powell one payment representing 46% of the amount of the immediately prior payment received from the United

States Government, and shall also issue to James H. Powell one payment representing 54% of the amount of the immediately prior payment received from the United States Government.

All costs of court expended in this cause are adjudged against the party by whom incurred, for which let execution issue.

IT IS DECREED that all relief requested in this cause and not expressly granted herein be and is hereby denied.

SIGNED this 1st day of October, 1980.

/s/

The Honorable W. T. McDonald, Jr.
Judge Presiding

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 14,145

JACK F. TRAHAN,

Appellant

VS.

EMMA J. TRAHAN,

Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT No. 344,539, HONORABLE CHARLES D. MATHEWS, JUDGE

This is a partition suit in which Jack F. Trahan appeals from the district court's judgment awarding his former spouse, Emma J. Trahan, 38.96% of his Air Force non-disability retirement benefits. By cross-point, appellee claims the trial court erred in awarding to her these retirement benefits only from June 25, 1981 rather than from April 30, 1965, the date appellant retired.

PROCEDURAL HISTORY

-I-

The Trahans were married on September 4, 1943 and were divorced on January 22, 1963. During this time appellant was a member of the Air Force. (It is stipulated that the Trahans were married 187 months of the 240 months appellant was in the Air Force.) The divorce decree, however, did not award appellee any share of appellant's retirement benefits. Appellant retired from the Air Force on April 30, 1965 and began receiving retirement benefits at that time. The Trahans remarried on October 28, 1970 but were divorced on May 7, 1971. Again, the second divorce decree did not award appellee any interest in appellant's retirement benefits. Both divorce decrees were silent on this matter.

Appellee brought a suit for partition of appellant's retirement benefits and a judgment in her favor was entered on January 19, 1979 awarding her 38.96% of appellant's retirement benefits paid to him since April 30, 1965 and like percentage of all future non-disability retirement benefits. This judgment was affirmed by the Court of Civil Appeals. *See* Trahan v. Trahan, 609 S.W.2d 820 (Tex. Civ. App. 1980). Writ of error was granted by the Supreme Court of Texas and during the pendency of that appeal the United States Supreme Court announced its decision in McCarty v. McCarty, 453 U.S. 210 (1981). The Court held in *McCarty* that non-disability retirement pay may not be divided pursuant to state community property laws. The Supreme Court of Texas, citing *McCarty* and the Supremacy Clause of the United States Constitution, reversed and rendered judgment that Emma J. Trahan take nothing. *See* Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981).

II

This present suit was filed by Emma Trahan on February 10, 1983 again seeking to partition appellant's retirement benefits in light of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C.A. § 1408 (West 1983). The district court ordered a partition of appellant's retirement benefits from June 25, 1981, awarding appellee 38.96% of said benefits.

Appellant brings five points of error, the thrust of these points being that the decision of the Supreme Court of Texas in Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981) is *res judicata* as to appellee's present cause filed on February 10, 1983, irrespective of the Uniformed Services Former Spouses Protection Act, 10 U.S.C.A. § 1408 (West 1983). Appellant also claims the court order constitutes an illegal garnishment of his wages.

McCARTY

The United States Supreme Court held in McCarty v. McCarty, 453 U.S. 210 (1981) that non-disability retirement pay may not be divided upon divorce pursuant to state community property laws. Richard McCarty served in the Army for twenty years and during all but two of these years he was married to Patricia McCarty. A California superior court awarded Patricia approximately 45% of her husband's retirement pay. That judgment was affirmed by the California Court of Appeals and writ of certiorari was granted by the United States Supreme Court to decide the question of whether or not "the federal scheme of military retirement benefits preempts all state community property laws with respect thereto, and that . . . [state] courts are accordingly precluded by the Supremacy Clause from dividing such benefits. . . ." *McCarty, supra* at 219 n. 12. The Supreme Court, citing Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979),

held that "the application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests." *McCarty, supra* at 232. Questions were then raised such as whether or not McCarty would be applied retroactively and whether courts in community property states would now be able to effect a just distribution of the marital estate upon divorce. *See, e.g.,* Raggio & Raggio, *McCarty v. McCarty: The Moving Target of Federal Pre-Emption Threatening All Non-Employee Spouses,* 13 St. Mary's L.J. 505 (1982); Note, *McCarty v. McCarty: The Battle Over Military Nondisability Retirement Benefits,* 34 Baylor L. Rev. 335 (1982); Note, *Military Retirement Pay Not Subject To Division As Community Property Upon Divorce: McCarty v. McCarty,* 19 Hous. L. Rev. 591 (1982).

POINTS OF ERROR

POINT OF ERROR ONE

THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT BASED ON THE FINAL JUDGMENT IN *POWELL V. POWELL*, 620 S.W.2d 253 (WACO APP., 1981, WRIT REF'D, N.R.E.) WHICH BARS RESPONDENT'S SUIT UNDER THE DOCTRINE OF RES JUDICATA. [DEFENDANT'S SECOND AMENDED ORIGINAL ANSWER, DEFENDANT'S FIRST AMENDED MOTION FOR SUMMARY JUDGMENT, AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, T-36, 40, 76; POINT ONE, APPELLANT'S BRIEF; POINT ONE, APPELLANT'S MOTION FOR REHEARING].

POINT OF ERROR TWO

THE COURT OF APPEALS ERRED IN HOLDING THAT 10 U.S.C. § 1408 CREATES A NEW CAUSE OF ACTION IN RESPONDENT BECAUSE THE UNIFORMED FORMER SPOUSES PROTECTION ACT (FSPA OR THE ACT) IS NOT APPLICABLE TO THE PARTIES IN THIS ACTION [T-36, 40, 76; POINT TWO, APPELLANT'S BRIEF; POINT TWO, APPELLANT'S MOTION FOR REHEARING].

POINT OF ERROR THREE

THE COURT OF APPEALS ERRED IN SUSTAINING THE TRIAL COURT'S GRANTING OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE LOWER COURT'S INTERPRETATION OF 10 U.S.C. § 1408 RESULTS IN A TAKING OF PETITIONER'S PROPERTY WITHOUT COMPENSATION AND DENIES PETITION-

ER'S RIGHT TO DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION [T-36, 78, 131; POINT THREE, APPELLANT'S BRIEF; POINT THREE, APPELLANT'S MOTION FOR REHEARING].

POINT OF ERROR FOUR

THE COURT OF APPEALS ERRED IN SUSTAINING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE LOWER COURT'S INTERPRETATION OF 10 U.S.C. § 1408 RESULTS IN A TAKING OF PETITIONER'S PROPERTY WITHOUT COMPENSATION AND DENIES PETITIONER'S RIGHT TO DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION [T-36, 40, 131; POINT FOUR, APPELLANT'S BRIEF; POINT THREE, APPELLANT'S MOTION FOR REHEARING].

POINT OF ERROR FIVE

THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT IS ENTITLED TO BRING THIS ACTION UNDER THE UNIFORM DECLARATORY JUDGMENTS ACT, ARTICLE 2524-1, TEX.REV.CIV.STAT., BECAUSE THE JUDGMENTS ACT IS INAPPLICABLE TO THIS CONTROVERSY AND DOES NOT PROVIDE FOR THE RELIEF GRANTED TO RESPONDENT. [T-36, 41, 76, 107-129; POINT FIVE, APPELLANT'S BRIEF; POINT FIVE, APPELLANT'S MOTION FOR REHEARING].

POINT OF ERROR SIX

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S GRANTING OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT THE RESPONDENT'S SUMMARY JUDGMENT PROOF DID NOT ESTABLISH RESPONDENT'S ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW [T-64, 68; POINT SIX, APPELLANT'S BRIEF; POINT SIX, APPELLANT'S MOTION FOR REHEARING].

POINT OF ERROR SEVEN

THE COURT OF APPEALS ERRED IN SUSTAINING THE TRIAL COURT'S GRANTING OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE COURT'S HOLDING HAS VOIDED THE PRIOR JUDGMENT IN *POWELL V. POWELL*, 620 S.W.2d 253 (WACO APP., 1981, WRIT REF'D, N.R.E.) AND HAS REINSTATED THE PRIOR TRIAL COURT JUDGMENT IN THAT CAUSE, WHICH DENIES PETITIONER'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION [T-37, 78; POINT SEVEN, APPELLANT'S BRIEF; POINT SEVEN, APPELLANT'S MOTION FOR REHEARING].

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No. 85-1459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES H. POWELL,

Appellant,

v.

RUTH ANN POWELL,

Appellee.

On Appeal From The Court of Appeals of Texas for the Tenth Supreme Judicial District

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Did Congress intend by its enactment of the Uniformed Former Spouses Protection Act, 10 U.S.C. ss 1408, to retroactively remove the preemption established under prior federal law as interpreted in *McCarty v. McCarty*, 453 U.S. 210 (1981), thereby nullifying this Court's decision in *McCarty* and replacing the preemptive federal statutes with state community property statutes which redefine Appellant's property interests in military retirement pay established at the time of a 1965 divorce?

2. Is the application of Texas community property and partition laws to a 1965 divorce, whereby military retirement benefits became solely vested in Appellant under prior federal law and by a final judgment based on such law, repugnant to the Constitution and laws of the United States?

3. Does the application of current Texas law to property rights vested under prior federal law and by final judgment result in a divestiture of such rights and a deprivation of defenses related to such rights so as to constitute a denial of federal due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

4. Did the award of a money judgment and an award of forty-six percent of Appellant's military retirement benefits to Appellee constitute a taking without compensation or a denial of federal due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

LIST OF PARTIES

The caption of the case in this Court contains the names of the parties.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1459

JAMES H. POWELL,

Appellant,

v.

RUTH ANN POWELL,

Appellee.

On Appeal From The Court Of Appeals of Texas For The Tenth Supreme Judicial District

---

MOTION TO DISMISS OR AFFIRM

Appellee Ruth Ann Powell respectively moves to dismiss the appeal of James H. Powell, or alternatively, to affirm the opinion and judgment of the Courts below.

The basis of this suit is whether Texas Courts are entitled to apply Texas community property law to divide military retirement benefits in divorce proceedings.

QUESTIONS BEFORE THE COURT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257(2).

II. The Questions Presented Are Insubstantial And Were Correctly Decided Below.

1. The application of Texas community property laws is not repugnant to federal retirement laws as modified by the USFSPA.

2. The doctrine of res judicata as applied by Texas Courts is not repugnant to the Constitution and laws of the United States.

3. The application of Texas community property law by Texas Courts is not repugnant to the Constitution and laws of the United States.

4. USFSPA nullifies the effect of the McCarty decision and permits state courts to deal with military retirement benefits in accordance with local law.

5. The award of military retirement benefits to appellee does not violate any Fifth or Fourteenth Amendment rights of appellant.

BRIEF OF ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257(2).

Appellant asserts jurisdiction under 28 U.S.C. Section 1257(2), claiming that the Texas Community property statutes and Texas property law have been applied to the facts of this case in a manner he alleges is repugnant to the laws of the United States. For jurisdictional authority, appellant relies upon *McCarty v. McCarty*, 453 U.S. 210 (1981).

This Court in *McCarty* acquired jurisdiction in that case because the federal military retirement benefits statute then in existence pre-empted state community property laws and therefore state divorce courts were precluded by the Supremacy Clause from dividing such benefits. 453 U.S. at 219 n. 12.

In acquiring jurisdiction this Court determined that the federal retirement statutes conflicted with state community property rights; and that the state community property rights, as applied, injured the objectives of the federal retirement program as it then existed. Ibid at 232.

The crucial fact distinguishing the present case is that Congress enacted the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408 AFTER the decision in *McCarty*. By this legislation, Congress has specifically granted to state divorce courts that authority which McCarty pre-empted them from exercising. Therefore, no conflict exists between state and Federal laws. The jurisdictional basis asserted by Appellant, namely, that the community property laws are repugnant to the Federal retirement laws, no longer exists.[1]

The principal entitlement of former spouses is set forth in Section 1408(c)(1) of the act:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as prop-

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[1] This Court denied a Petition for Certiorari in a case involving similar questions to the instant case. *Jett v. Jett*, 449 So.2d 557 (La.Ct.App. 1984), writ den. 458 So.2d 473 (La. 1984), cert. den. 105 U.S. 2215 (No. 84-1375, April 22, 1985).

> erty solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

This Court predicted in *McCarty* that, "Congress may well decide . . . that more protection should be afforded the former spouse of a retired servicemember. This decision, however, is for Congress alone". 453 U.S. at 235.

Appellant's arguments that the Texas Courts have misinterpreted federal law are incorrect. The newly enacted USFSPA set up a system where each state court now divides retirement benefits in accordance with the law of the jurisdiction of that state. A state court facing a division of military retirement benefits does not look to federal law to determine how the retirement benefits are to be divided, but to the laws of the state.

Appellant also argues that the judgment imposes a retroactive application of section 3.63(b)(1) of the Texas Family Code. No authority is cited in Appellant's Statement of Jurisdiction supporting his claim that the judgment in question is repugnant to and a violation of the takings and due process clauses of the Fifth and Fourteenth Amendments. *Cameron v. Cameron*, 641 S.W. 2d 210 (Tex. 1982) at 220 decided that the property spouses acquire during marriage, except by gift devise or descent should be divided as community property, irrespective of the domicile of the spouses when they acquire the property. The Texas Supreme Court in it's rationale did consider section 3.63(b)(1) of the Texas Family Code, together with an exhaustive anaylsis of the common law of various jurisdictions. The holding in *Cameron*, applied

to the present case, is not an improper application of Texas law.

II. The Questions Presented Are Insubstantial And Were Correctly Decided Below.

1. The application of Texas community property laws is not repugnant to federal retirement laws as modified by the USFSPA.

[See brief of argument under I., supra.]

2. The doctrine of res judicata as applied by Texas Courts is not repugnant to the Constitution and laws of the United States.

The Court below correctly decided the res judicata issue in holding that the enactment of the USFSPA "created a new fact, a change in the law and a new cause of action." The Court decided that under Texas common law, the doctrine of res judicata did not apply to the facts of this case. In Texas, the judgment in a prior case was res adjudicata only of the issue then presented of the facts as they then appeared *and of the legislation then existing.' State v. Powell*, 134 SW2d 746, 748 (Tex. Civ. App. 1910, writ ref'd), quoting *Utter v. Franklin*, 172 U.S. 416 (1899) (emphasis added). See also *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

Appellant incorrectly argues that *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981) should be followed. In that case, Moitie failed to perfect an appeal from the first order dismissing his federal claim. During the appeal of his co-plaintiffs, this Court modified prior law. Moitie filed a state law claim which this Court decided was not barred by the prior federal dismissal. Appellant argues that the rationale in *Moite* should be followed, when the holding was that state

court claims are not barred by a dismissal of federal claims.

The factual situation of the present case is complicated, and does present new issues as to whether res judicata should be applied. Under the USFSPA, state courts are to apply the law of the local jurisdiction to division of military retirement benefits. The Texas courts have ruled in favor of Appellee, and said decisions are not repugnant to Constititutional provisions. If Mrs. Powell had waited to file her initial suit for partition after the enactment of the USFSPA, the defense of res judicata would not have been asserted. Appellant argues that because Mrs. Powell's first case fell into the "gap" between *McCarty* and the enactment of the USFSPA, that she is barred from relief to which she would be entitled if she had waited until after *McCarty* and the USFSPA to file her suit for partition.

> 3. The application of Texas community property law by Texas Courts is not repugnant to the Constitution and laws of the United States.

Appellant argues that Congress did not intend, and that the law does not permit, the "reopening" of court orders decided prior to McCarty, the present action is not a suit "to reopen" in the usual sense of that word. This is a *partition* action, which, in its very essence, does not seek to "reopen" a prior order or case. The theory of a partition action in the context of divorce is that former spouses become tenants-in-common as to any assets not divided in their divorce decree. As tenants-in-common, they are entitled to seek a subsequent partition of their co-tenant estate. A partition action has always been regarded under

Texas law as something quite distinct from a bill of review or other action seeking to reopen or modify a prior judgment.

Appellant's argument that he is the victim of a retroactive application of partition actions based on an anaylsis of *Cameron v. Cameron*, 641 S.W. 2d 210 (Tex. 1982) are incorrect. *Cameron* arose before the effective date of section 3.63(b)(1) of the Texas Family Code. That section was considered but was not dispositive of the holding in that case.

> 4. The construction of the USFSPA by the Texas courts, applying Texas law, does not create an improper retroactive judgment repugnant to prior federal law and the Constitution and laws of the United States.

Appellant argues that the lower court has created a retroactive judgment. This is not true. Appellee in her second suit sought relief only within the rights created by the USFSPA. Appellee made no claims for relief from the date of the original divorce action to the effective date of the USFSPA. Appellee did not seek any retroactive relief, and none was granted.

The Court in *Trahan v. Trahan*, 682 SW2d 332, 334 (Tex. Ct. App.—Austin, 1984, writ ref'd n.r.e.), citing *Cameron v. Cameron*, 641 SW2d 210, 212 (Tex. 1982). correctly held that the purpose of the USFSPA is to reverse the effect of the *McCarty* decision.

The holding in this case and *Trahan* is amply supported by the legislative history. The opinion in *Trahan* quotes extensively from Senate Report No. 502, *Trahan v. Trahan*, supra, p.335, which includes the following observation:

> The provisions of S. 1814 reversing the effect of the *McCarty* decision are retroactive to June 26, 1981, the date on which the U.S. Supreme Court issued that decision. That is, the committee intends the legislation to restore the law to what is was when the courts were permitted to apply state divorce laws to military retired pay.

Most of the state courts which have construed the USFSPA have reached the same conclusion. See, for example, *In re Marriage of Hopkins*, 191 Cal. Rptr. 70 (Cal Ct. App. 1983); *Smith v. Smith*, 458 A2d 711 (Del. Fam. Ct. 1983); *Walentowski v. Walentowski*, 672 P2d 657 (NM 1983); *De Gryse v. De Gryse*, 661 P2d 185 (Ariz. 1983); *In re Smith*, 669 P2d 448 (Wash. 1983); *Castiqlioni v. Castiglioni*, 471 A2d 809 (N.J. Super. 1984); *Jett v. Jett*, 449 So.2d 557 (La. Ct. App. 1984), writ den. 458 So.2d 473 (La. 1984), cert. den. 105 S.Ct. 2115 (No. 84-1375, April 22, 1985).

The two cases cited in Appellant's Jurisdictional Statement, *Moller v. Moller*, 356 NW2d 909 (S.D. 1984) and *Bishir and Britt v. Bishir*, 698 S.W. 2d 823 (Ky. 1985), do not take a contrary view. Both of these cases involved a request to reopen divorce judgments final before the *McCarty* decision. The Courts declined to do so, but solely on the basis of local law, not on the basis of any construction of the USFSPA or *McCarty*.

Appellant makes various complaints about the way in which the Texas court applied its community property law. In so doing, Appellant misses a fundamental thrust of the USFSPA, which is that a state "court may treat disposable retired or retainer pay . . . *in accordance with the law of the jurisdiction of such court*." 10 U.S.C. Section 1408(c) [italics added]. the

legislative history makes clear that "The provision is intended to remove the federal pre-emption found to exist by United States Supreme Court and permits State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable." Senate Report No. 502, quoted in the opinion below, 682 SW2d at page 335.

This also disposes of Appellant's complaint that the decisions of some states are in conflict. The USFSPA permits diverse treatment "in accordance with local law". Section 1408(c) (1). This Court has repeatedly recognized that "the whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1980), quoted in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), and in *McCarty*, 453 U.S. 210, 212.

Appellant also argues that, even if *McCarty* is no longer effective today, it still has retroactive effect prior to 1981. To the contrary, Congress obviously intended that the USFSPA should nullify *McCarty* altogether.(2) This is apparent from the basis entitlement section, Section 1408(c)(1), quoted above. The Section selects as the beginning date June 25, 1981 which was the day prior to the date on which the decision in *McCarty* was handed down.

Virtually every court which has addressed the issue of whether *McCarty* was intended to be retroactive, has held that it is not retroactive, many cases so holding even before the USFSPA had passed. *Segrest v. Segrest*, 649 SW2d 610 (Tex. 1983); *McGinn v. McGinn*, 337 NW 2d 632 (Mich. Ct. App. 1983); *Erspan v. Badgett*, 659 F2d 26 (5th Cir. 1981); *Rodriquez*

v. Rodriquez, 133 Ariz. 88, 649 P2d 291 (Ariz. Ct. App. 1982); *In re Marriage of Fellers*, 125 Cal. App. 3d 254, 178 Cal. Rptr. 35 (Cal. Ct. App 1981); *In re Marriage of Allcock*, 107 I11. App. 3d 150, 62 Ill. Dec. 865, 437 Ne2d 392 (I22. Ct. App. 1982); *Whenry v. Whenry*, 652 P2d 1188 (N.M. 1982); *In re Marriage of Vinson*, 644 P2d 635 (Ore Ct. App. 1982).

5. The award of military retirement benefits to appellee does not violate any Fifth or Fourteenth Amendment rights of appellant.

Appellant argues that the lower courts decision improperly divests him of rights contrary to the Fifth and Fourteenth Amendments. It has long been held by both Federal and Texas courts that a government pension is a "public right", and that a public employee has no vested rights in the statutory pension. *Dodge v. Board of Education*, 302 U.S. 74, 82 L.Ed. 57, 58 S.Ct. 98 (1937); *Stouper v. Jones*, 284 F2d 240 (D.C. Ct. App. 1960); *Dallas v. Trammell*, 129 Tex. 150, 101 SW2d 1009 (Tex. 1937).

Appellant had no exclusive property right in his military retirement benefits at the time of his divorce in 1963. Under Texas law, military retirement benefits were community property at that time. *Kirkham v. Kirkham*, 335 SW2d 393 (Tex. Ct. App.—San Antonio, no writ).

The only case cited by Appellant is *U.S. v. Larionoff*, 431 U.S. 864 (1977). In *Larionoff*, this Court held that naval personnel were entitled to re-enlistment bonuses based upon regulations in effect at the time they signed a re-enlistment agreement with the Navy, despite the fact that the Navy subsequently changed the terms of the bonus by regulation. It is

important to note that the decision in *Larionoff* (a narrow 5-4 vote), turned on the fact that the benefit involved, a re-enlistment bonus, was based upon a specific re-enlistment agreement between the government and the particular servicemen involved, which created contractual rights. In addition, this Court expressly declined to base its holding on any constitutional grounds, but rather based the decision on a construction of congressional intent. The Federal Courts of Appeals have upheld the action of Congress in altering government pension rights on several occasions. *Stouper v. Jones*, 284 F2d 240 (D.C. Ct. App. 1960); *Costello v. United States*, 587 F2d 424, 426 (Ct. App.—9th Cir., 1978), cert. den., 442 U.S. 929, 99 S.Ct. 2858, 61 L.Ed. 2d 296 (1979).

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this appeal should be dismissed or alternatively, that the judgment of the lower courts below be affirmed.

Respectfully submitted,

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85 - 1459

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES H. POWELL,

Appellant

v.

RUTH ANN POWELL,

Appellee

ON APPEAL FROM THE COURT OF APPEALS OF TEXAS FOR THE TENTH SUPREME JUDICIAL DISTRICT

REPLY TO MOTION TO DISMISS OR AFFIRM

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REPLY TO MOTION TO DISMISS OR AFFIRM

I. This Court has jurisdiction on the same grounds as it did in McCarty.

Appellee severely mischaracterizes this suit as a divorce proceeding. The parties were divorced in 1965. The only issue presented herein is whether Appellee owns a joint tenancy right in property by virtue of the Uniformed Services Former Spouses Production Act (FSPA). The parties' 1963 divorce is the source from which the tenancy in common interest, if any, must be derived.

A tenancy in common interest may arise from a number of circumstances, the most common of which is by inheritance of a joint interest in property. Some of the community property states, of which Texas is one, maintain that a tenancy in common interest can arise when community property is held during the marriage, but is not specifically divided in the divorce decree. If the property is not divided upon divorce it is held by the parties as tenants in common and is merely divided

under the general laws pertaining to partition suits. §9 Tex. Jur. 3d Family Law 379. Before the parties can acquire a tenancy in common interest, the property must be properly characterized as "community" property during the marriage. As a practical matter this characterization is never made until there is a death of one of the spouses or the parties are divorced. The interest in the property is determined under the law as it exists at the time of death or divorce. Further, the rights to the property must have become vested during marriage. The property in question, military retirement pay, has been repeatedly held to be a vested property right. See Taggart v. Taggart, 552 S.W.2d 442 (Tex. 1977).

The law in effect at the time the tenancy in common interest is claimed to have arisen in 1963 was not the FSPA, but the statutory scheme explored in McCarty. It is for this reason that Appellant has brought this case to the Supreme Court under the same jurisdictional grounds as McCarty. The 1963 community property laws in Texas were in conflict with and in-

vaded substantial federal interests under the 1963 federal law governing retirement pay. In other words, no community property interest could have arisen in 1963 because federal law preempted the state community property laws. Consequently no tenancy in common interest could have arisen.

For further grounds Appellant would show that the state law concerning the percentage of interest is repugnant to and a clear violation of the Fifth and Fourteenth Amendment guarantees of due process. If this Court were to find that Congress can retroactively modify the federal law in effect in 1963, then it is necessary to look at the state law to determine the percentage of interest held by the parties as tenants in common. Again, Appellee cannot own, as a joint tenant, any greater interest than she owned during the marriage. This interest, if any is determined under the laws in effect at the time of divorce. Cameron was not decided until 1982 and 3.63 (b) (1) of the Texas Family Code was not effective until September 1, 1981. Under the

lower courts holding a party could wait twenty years or more, until the law becomes more favorable, then claim a greater property interest than such party would have had at the time the interest arose. Surely this has never been the law in Texas or anywhere else, but either a dismissal or affirmation of the lower court's decision will allow it to become the law.

II. The Questions Presented are Substantial

In 1981, a court of competent jurisdiction held that Appellee had no partitionable property right. Powell v. Powell, 620 S.W.2d 253 (Tex.App. 1981, error ref., n.r.e.).

Appellee argues and the lower held that the 1981 judgment between these parties is not res judicata of the issues then presented, facts as they then appeared and legislation then existing. The issue "then presented" was whether or not the Powells held property, military retirement benefits past and future, as tenants in common. No new issues are presented in this case. The "facts" as they "then appeared" are identical -- the only new fact

created by the FSPA is the fact that a new law was enacted.

Appellee argues that had she waited to file suit until after the enactment of the FSPA, res judicata would not be presented. This is no justification for simply ignoring the prior case. Our entire judicial system would fail if final judgments could be ignored every time the law changed to favor a particular litigant. Furthermore, there is nothing in the FSPA which addresses the setting aside of a prior final judgment. Cox v. Cox, 223 CalRptr. 655 (Cal.App. 4 Dist., 1986).

To contend, as Appellee has done, that a new law applied to a controversy already settled between the parties is not retroactive, is absurd. Id. All of the cases cited by Appellee as supportive of this result, including Jett v. Jett, 449 So.2d 557 (La.Ct.App. 1984), writ den. 458 So. 2d 473 (La. 1984), cert. den. 105 S.Ct. 2115 (1985), are divorce cases which prospectively award a portion of military retirement pay. Appellant agrees that the FSPA was intended to nullify the effects of McCarty, not

McCarty. Further, the effects are only nullified for persons divorcing after or for persons whose decrees had not become final as of the effective date of the Act.

Appellee further argues that McCarty has been held not to be retroactively applicable. The basis for those Texas decisions, involved instances where prior judgments awarding military retirement pay had already become final. In Segrest v. Segrest, 649 S.W.2d 610 (Tex. 1983), the Texas Supreme Court correctly followed this Court's decision in Federated Department Stores v. Moitie, 452 U.S. 394 (1981), holding that a law should not be retroactively applied to disturb final judgments, even if such judgments were erroneous. The 1981 judgment in this case was based upon the correct law. Yet, Appellee argues that the FSPA should be retroactively applied as if McCarty were never decided. Surely the FSPA is not interpreted by this Court to violate the Separation of Powers doctrine!

Appellee states that "Appellant misses [the] fundamental thrust of the USFSPA", to devide retirement

pay according to state law. The state law is and always has been that this is a suit to partition a tenancy in common interest. If the Act allows enforcement in accordance with state law, then the state law is and always has been that no tenancy in common right arises in property which could not have been awarded at the time of divorce. Further, the state law has never been that a final judgment may be ignored and held of no force and effect because the law has changed. See Houston Family Law Section article on interesting cases by David N. Gray discussing Powell v. Powell.

Finally, Appellee argues that a governmental pension is a public right in which there are no "vested rights". If Appellant's rights are not vested, then they were not subject to being divided as community property under Texas law and no tenancy in common rights could have arisen. See Busby v. Busby, 457 S.W. 2d 551 (Tex. 1970). Appellee cites in support of her proposition, Stouper v. Jones, 284 F2d 240 (D.C. Ct.App. 1960) and Costello v. United States, 587 F2d 424 (Ct.App.-9th Cir.,

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The second case, Costello, states that rights can only be prospectively altered. Appellant had already received over $24,446.00 in retirement pay prior to the effective date of the Former Spouse's Protection Act and the date of filing this suit, $11,245.22 of which has been

awarded to Appellee. Further if Costello and McCarty are correct that retirement pay is current pay for reduced continuing services, then under community property concepts, such pay would be current income and thus community property of the present marriage between Appellant and Mrs. Nancy Powell, his wife of 19 years. The holding in this case undeniably divests Appellant of his property rights established under federal law in 1965 and further compounds the due process deprivation by holding that a final judgment declaring this result is of no force and effect.

Should Appellee's Motion be granted, this Appellant, who served his country in time of war, will have learned that he cannot rely on the final judgment of a court, that Congress can retroactively change prior law, that a decision of this, the highest court, can be overruled by a lower court's interpretation of congressional intent and that neither the Constitution nor this Court will afford him protection from this grave injustice. Granted, Appellant will suffer should Appellee's

Motion be granted, but such suffering pales in the light of the irreparable damage to the law and the authority of this Court. Mrs. McCarty has again filed suit. Can neither Appellant nor Mr. McCarty or others similarly situated rely upon a decision of this Court? Should Appellee's Motion be granted, then the answer is, they cannot.

CONCLUSION

Appellant respectfully prays that this reply be considered in conjunction with his Appeal and alternate application for Writ of Certiorari and that Appellee's Motion to Dismiss or Affirm be accordingly denied.

Respectfully submitted

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Supreme Court, U.S.
FILED
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CLERK

No. 85-1459

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

JAMES H. POWELL,

Appellant

v.

RUTH ANN POWELL,

Appellee

ON APPEAL FROM THE COURT OF APPEALS OF TEXAS FOR THE TENTH SUPREME JUDICIAL DISTRICT

REPLY TO MOTION TO DISMISS OR AFFIRM

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Attorney for Appellant

REPLY TO MOTION TO DISMISS OR AFFIRM

I. This Court has jurisdiction on the same grounds as it did in McCarty.

Appellee severely mischaracterizes this suit as a divorce proceeding. The parties were divorced in 1965. The only issue presented herein is whether Appellee owns a joint tenancy right in property by virtue of the Uniformed Services Former Spouses Production Act (FSPA). The parties' 1965 divorce is the source from which the tenancy in common interest, if any, must be derived.

A tenancy in common interest may arise from a number of circumstances, the most common of which is by inheritance of a joint interest in property. Some of the community property states, of which Texas is one, maintain that a tenancy in common interest can arise when community property is held during the marriage, but is not specifically divided in the divorce decree. If the property is not divided upon divorce it is held by the parties as tenants in common and is merely divided

under the general laws pertaining to partition suits. §9 Tex. Jur. 3d Family Law 379. Before the parties can acquire a tenancy in common interest, the property must be properly characterized as "community" property during the marriage. As a practical matter this characterization is never made until there is a death of one of the spouses or the parties are divorced. The interest in the property is determined under the law as it exists at the time of death or divorce. Further, the rights to the property must have become vested during marriage. The property in question, military retirement pay, has been repeatedly held to be a vested property right. See Taggart v. Taggart, 552 S.W.2d 442 (Tex. 1977).

The law in effect at the time the tenancy in common interest is claimed to have arisen in 1965 was not the FSPA, but the statutory scheme explored in McCarty. It is for this reason that Appellant has brought this case to the Supreme Court under the same jurisdictional grounds as McCarty. The 1965 community property laws in Texas were in conflict with and in-

vaded substantial federal interests under the 1965 federal law governing retirement pay. In other words, no community property interest could have arisen in 1965 because federal law preempted the state community property laws. Consequently no tenancy in common interest could have arisen.

For further grounds Appellant would show that the state law concerning the percentage of interest is repugnant to and a clear violation of the Fifth and Fourteenth Amendment guarantees of due process. If this Court were to find that Congress can retroactively modify the federal law in effect in 1965, then it is necessary to look at the state law to determine the percentage of interest held by the parties as tenants in common. Again, Appellee cannot own, as a joint tenant, any greater interest than she owned during the marriage. This interest, if any is determined under the laws in effect at the time of divorce. Cameron was not decided until 1982 and 3.63 (b) (1) of the Texas Family Code was not effective until September 1, 1981. Under the

lower courts holding a party could wait twenty years or more, until the law becomes more favorable, then claim a greater property interest than such party would have had at the time the interest arose. Surely this has never been the law in Texas or anywhere else, but either a dismissal or affirmation of the lower court's decision will allow it to become the law.

II. The Questions Presented are Substantial

In 1981, a court of competent jurisdiction held that Appellee had no partitionable property right. Powell v. Powell, 620 S.W.2d 253 (Tex.App. 1981, error ref., n.r.e.).

Appellee argues and the lower held that the 1981 judgment between these parties is not res judicata of the issues then presented, facts as they then appeared and legislation then existing. The issue "then presented" was whether or not the Powells held property, military retirement benefits past and future, as tenants in common. No new issues are presented in this case. The "facts" as they "then appeared" are identical -- the only new fact

created by the FSPA is the fact that a new law was enacted.

Appellee argues that had she waited to file suit until after the enactment of the FSPA, res judicata would not be presented. This is no justification for simply ignoring the prior case. Our entire judicial system would fail if final judgments could be ignored every time the law changed to favor a particular litigant. Furthermore, there is nothing in the FSPA which addresses the setting aside of a prior final judgment. Cox v. Cox, 223 CalRptr. 655 (Cal.App. 4 Dist., 1986).*

To contend, as Appellee has done, that a new law applied to a controversy already settled between the parties is not retroactive, is absurd. Id. All of the cases cited by Appellee as supportive of this result, including Jett v. Jett, 449 So.2d 557 (La.Ct.App. 1984), writ den. 458 So. 2d 473 (La. 1984), cert. den. 105 S.Ct. 2115 (1985), are divorce cases which prospectively award a portion of military retirement pay. Appellant agrees that the FSPA was intended to nullify the effects of McCarty, not

McCarty. Further, the effects are only nullified for persons divorcing after or for persons whose decrees had not become final as of the effective date of the Act.

Appellee further argues that McCarty has been held not to be retroactively applicable. The basis for those Texas decisions, involved instances where prior judgments awarding military retirement pay had already become final. In Segrest v. Segrest, 649 S.W.2d 610 (Tex. 1983), the Texas Supreme Court correctly followed this Court's decision in Federated Department Stores v. Moitie, 452 U.S. 394 (1981), holding that a law should not be retroactively applied to disturb final judgments, even if such judgments were erroneous. The 1981 judgment in this case was based upon the correct law. Yet, Appellee argues that the FSPA should be retroactively applied as if McCarty were never decided. Surely the FSPA is not interpreted by this Court to violate the Separation of Powers doctrine!

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* Case or article is lodged in clerk's file. Additional article from Library of Congress concerning due process issue is also lodged in clerk's file.